

The UK Constitution and Brexit – Five Brief External Observations

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1. Turbulent times

The last few weeks have been turbulent times in British politics (to say the least): A new Prime Minister taking office after an internal vote of the members of the conservative party; a Parliament unwilling to follow this new Government in any of its proposals; 21 Conservative MPs being thrown out of the party as a consequence; an opposition leader not voting for a snap election (with the Leader of the House showing what he thinks of that by lying flat out on the first bench); a Prime Minister indicating that he might be willing to disrespect the law; a prorogation of parliament against its own will ending debates in one of the most crucial political times in British history and finally a Scottish court ruling this prorogation unlawful (without really knowing what this unlawfulness might lead to). As a constitutional lawyer one therefore cannot help but ask: What is happening to the British Constitution? What is going on with the political and parliamentary culture of a nation so proud of its parliamentary history? And what about the Queen? In the following, I would therefore like to share five very brief and somewhat unsystematic observations of these recent developments from a German perspective. As a result I do believe the current political elite is to blame for a lot of all this. But there are also significant systemic problems regarding the structure of the British (unwritten) constitution.

2. Don't mix direct and indirect democracy

The first observation is nothing really new and not even specifically Brexit-related: Be careful when mixing direct and representative democracy. The referendum in 2016 is the reason for the current Brexit mess and I want to point to two severe theoretical Problems of direct democracy it made visible. First of all: No one can be held responsible in direct democratic procedures. As the people take the decision no one can be seriously blamed and voted out of office for its consequences. It is always the somewhat "wise and untouchable sovereign" that has spoken – in practice even criticising the decision (no matter how stupid it may have been) appears difficult. This is obviously different in a representative system where in the worst case we simply vote for another Parliament.

This directly leads to the second problem: the factual irreversibility of decisions taken in a referendum. The reversibility of decisions is actually a central element of any democratic order. Decisions can and will be reversed as soon as majorities change. Parliament could thus of course decide to reverse the decision taken in 2016 (from a legal perspective the referendum was not binding anyway). Politically, however, parliament will obviously not be able to do so as this would appear undemocratic.

So in case of a referendum the only somewhat legitimate institution able to reverse the decision would be the people themselves. But here again: asking for a second referendum would be (and actually is) perceived as being undemocratic for not respecting the sovereign's will as articulated in the first referendum. And this dilemma also is the reason why Boris Johnson is able to claim to be protecting democracy when circumventing parliament. So finally we might end up with a Brexit that at the time it finally occurs is actually rejected by the majority of MPs and possibly even the people only in order to respect a direct democratic decision taken more than three years ago by a people that at the time – as anybody else – had no idea what it was actually deciding upon. Now, to be clear: this is hardly a systemic deficit of the British constitution. The fault for all this lies entirely with David Cameron as the system itself might have allowed but clearly not requested to ask the people. Future Prime Ministers should respect these experiences made and stop pretending that direct democracy is of any higher value than indirect democracy. It all depends on the questions asked.

3. Functioning frameworks

The last few years have seen significant changes in some constitutional frameworks that in my view have at least contributed to some of the problems we are seeing right now. The first one dates back to 2011: the Fixed Term Parliament Act. This act specifically changed the competences of government when it comes to calling a snap election, making the sort of “zombie government” possible we are seeing at the moment: A government with no majority and thus unable to bring anything through parliament yet unable to call for an election. Of course, such a situation can occur in other parliamentary systems. However, the political culture in Britain does not seem to have adjusted to this new situation yet, especially as it is not common for members of the two leading parties to cooperate in order to form new reliable majorities. As a consequence we now see a situation similar to that of a presidential system with the executive and the legislative opposing each other, yet without anyone who might act as problem solver and no political culture used to such a situation.

A second observation (that is not restricted to Britain) is a problematic development concerning the selection process for party leaders. I believe we can see a growing influence of ordinary party members. The conservative party used to select its leader by its MPs and not too long ago switched to a general election process. Labour adopted this system only in 2014. And we see similar, apparently democratic, developments of course in the US, but now also in Germany (CDU and SPD). Now, why am I mentioning this? Because I believe that neither Donald Trump nor Boris Johnson would be the leader of their party and their country if we still had a system where the elite of the parties had the last word. This might sound less democratic at first and it probably is. However, a popular vote generally gives an advantage to more populist characters. Why? Because no ordinary political party member has anything to lose when voting for such tough and hard-line characters. MPs on the other hand have an incentive to choose someone who is able to compromise and ensure parliamentary majorities. Jeremy Corbyn might be popular with the labour base, yet is somewhat disliked by the MPs of his own party. And the same

is probably true for Boris Johnson – him getting rid of “obnoxious MPs” immediately after the No-No-Deal vote serves my point. I do not really have an answer what to do in this respect. I simply wanted to share my impression that the selection process of the party leader might be of an even greater relevance for the stability of a democracy than we thought so far.

4. Inter-institutional procedures

When looking at the parliamentary debates especially German scholars were somewhat surprised to see the government's influence on parliamentary procedures. Government does not only decide almost entirely on the parliamentary agenda but also has the possibility of proroguing Parliament – even against its own will. This is completely different compared to the German parliament that acts autonomously regarding all internal matters – especially its agenda. Now such a dependence is obviously no problem in normal times when government can be sure to have a majority in Parliament. But we see how such at first glance insignificant procedural arrangements can complicate matters where this fundamental requirement is missed. And in a fragmented society such situations might occur more often in the future. So we might need some sort of amendment here not only allowing parliament as a whole more influence but possibly also giving the opposition additional room to influence parliamentary proceedings.

5. Taking account of the voting system

The British voting system is somewhat legendary. The relative majority system has led to a two party system in which Tory and Labour Prime Ministers alternate. In parliament the Prime Minister sits opposite to the single leader of the opposition. This system has worked for centuries and changing it rapidly would hardly appear sensible. However, one should note that such a system only functions in a society that is more or less divided amongst these two party lines. As we see in other modern societies, however, this simple differentiation seems to have lost much of its significance. Societies are getting more fragmented. We have more parties, more interest groups and so on. And most important: We also see a split (or rather a complete mess-up) within the parties themselves. A political system that is founded on the idea of a homogenous government and a homogenous opposition is hardly capable of dealing with such a situation. In the long run we will thus need to think of how to mirror this development in the voting system, in order to ensure the necessary parliamentary responsiveness. And that might mean changing from a majority to a proportionality voting system or at least to constituencies where more than one MP is voted for (we can look to Ireland or Malta for instance and their single transferable vote system). Of course the two big parties will currently veto against such a change. But that does not alter the fact that we are currently seeing a problematic representation deficit under the existing system. And no political system will be able to keep up its legitimacy in such a situation for very long.

6. The lacking problem solver

When Boris Johnson asked for the prorogation of parliament all eyes were directed towards the Queen. Will she step in and ensure the rights of parliament? Will she prevent Johnson from circumventing parliament in a time of crisis? We all know the answer: no. And the media – not only the German media – soon justified this decision with the apparent role the Monarchy has grown into in the last 100 years. According to these comments the Monarch is not supposed to interfere with everyday politics but acts as an unpolitical institution. But is this really true? Can a head of state actually remain “unpolitical” where it comes to the foundations of the whole political system? When comparing this constitutional arrangement to others we find that for instance the German *Bundespräsident* – though obviously not nearly as glamorous as the Queen – is not reduced to mere representative functions but in times of crisis can also act as a problem solver. We saw that, for instance after the last election, with him more or less forcing the SPD into a coalition with Angela Merkels CDU. And we find similar intervention rights of the *Bundespräsident* in other times of crisis. The Monarch with all her authority therefore at least could have interfered and rejected the prorogation proposal because it was of course no matter of everyday politics but would have ensured parliamentary debate in a time of crisis. Who else could have taken over such a role? We simply seem to be lacking some sort of problem solver in the current system. Could the Supreme Court step in? Well we will see how it decides. But laying our hopes into the judiciary might not be the best solution in such a political crisis. Needed is rather an institution equipped with the necessary authority in order to (re)integrate the whole of society. And let me add as a German legal scholar: giving too much competences to a constitutional court can have its shady side on the political process.

7. Outlook: A written Constitution?

So who is to blame? The political elite or the system? As we learned recently from Stephen Levitsky and Daniel Ziblatt people will of course always matter as they need to comply to a culture of institutional cooperation and forbearance. With the prorogation of parliament and the threat to ignore the law Boris Johnson has in my view (and in the view of the Scottish court) breached this necessity. But the systemic deficiencies of the unwritten British constitution are hardly insignificant and this should make us think. To construct a functioning democracy is complex as the political system needs to reflect the current expectations of society. It therefore needs to offer sufficient participation, sufficient limitations on governmental powers but also sufficient efficiency. In my view we can see that the current system thereby no longer fully reflects the respective expectations as far as participation and efficiency is concerned – and that is independent from the people sitting in parliament and the government. It therefore might be time to think about a written constitution that tries to address these specific problems. The British constitution has functioned for hundreds of years. But being old is no argument in itself when it comes to generating the necessary legitimacy. Legitimacy takes place in the present not in the past and it's the present expectations that need to be met. Each generation therefore requires a constitution matching its ideas of how democracy

should function. And this is something the British political system will have to deal with – within or outside the EU.

